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CQ584



September 23, 2002

*via facsimile to 801-517-1021*

Council on Environmental Quality  
NEPA Task Force  
P.O. Box 221150  
Salt Lake City, Utah 84122

**CAET RECEIVED**

**SEP 23 2002**

**Re: Response to CEQ NEPA Task Force Request for Comments (67 Federal Register 45510 (July 9, 2002))**

Dear Task Force Members:

On behalf of Southern Company, this letter transmits comments on the proposed nature and scope of the activities of the Council on Environmental Quality's (CEQ) NEPA Task Force. With 4 million customers and nearly 37,000 megawatts of generating capacity, Atlanta-based Southern Company is a leading U.S. producer of electricity. Southern Company generated 165 billion kilowatt-hours of electricity in 2001 at its five Southeastern electric utilities: Alabama Power, Georgia Power, Gulf Power, Mississippi Power and Savannah Electric. Through these utilities, Southern Company supplies energy to a 120,000-square-mile service territory spanning most of Georgia and Alabama, southeastern Mississippi, and the panhandle region of Florida. Also, Southern Company owns a competitive generation company, an energy services business and a competitive retail natural gas business, as well as fiber optics and wireless communications.

Many projects undertaken by Southern Company or its subsidiaries are affected by the NEPA process. Accordingly, Southern Company is directly interested in improving and modernizing NEPA implementation. In that light, Southern Company supports the Task Force in its efforts to make NEPA more useful and directed. In our view, NEPA has evolved beyond its original scope and purpose and has become more cumbersome, in some respects, than necessary. These problems, however, can be identified and corrected without changing the important role that NEPA was intended to play in informing federal agencies, Congress and the public about the impacts to the human environment that result from major agency action.

Regarding the specific questions identified by the task force in its notice and request for comments (67 Fed. Reg. 45510):

1. Technology, Information Management and Information Security.

Southern Company favors the use of information management to enhance the effectiveness and efficiency of the NEPA process. However, information management must be tailored to the specific affected resource. While information management tools can facilitate independent scientific review and analysis, these tools should not be used in a manner that replaces scientific judgment. Southern Company is familiar with situations where, through information management, components of NEPA documentation for previous projects have been adopted for use in subsequent NEPA analysis. While this is appropriate in many cases, Southern Company urges CEQ to adopt procedures to ensure that the quality of scientific review and analysis does not suffer.

At the same time, the NEPA process currently suffers from information overload – often at the expense of useful analysis. The CEQ should recognize that more detail or more modern forms of information acquisition and transmission are no substitute for accurate analysis of the information.

Additionally, with regard to new information, the CEQ should limit the obligation to supplement previously completed NEPA documents. New technology and new methods of accessing and sharing information will always increase the temptation to revisit old decisions and their justifications. However, Congress never contemplated that NEPA would require perfect information or perfect analysis. Moreover, the requirement to assess cumulative impacts assures that the advancing base of information available is accounted for through future NEPA reviews.

To that end, it is also important for CEQ to clarify that NEPA reviews must be performed based on existing information. It is unfair and inappropriate for resource agencies, for example, to ransom their cooperation and approval for additional research.

Under the CEQ proposal, the cooperating agencies have equal rank in making crucial decisions regarding the licensing process, such as the development of a study plan. Resource agencies have complained that Congress has not supplied sufficient funding to carry out their congressionally authorized duties (for example, with respect to hydropower licensing). Accordingly, there is a concern that resource agencies will require private parties affected by NEPA actions to perform, at their expense, studies designed to support resource agency positions, such as to support the installation of fishways. By way of contrast, FERC has ruled that it is not obligated to provide a record to support the Department of Interior's decision-making. It is up to the Department of Interior to provide the record to support any fishways it prescribes. 92 FERC 61,037. The CEQ should make NEPA consistent with this approach.

Security and confidentiality of information is an important issue for Southern Company. We recommend that the CEQ develop default security and confidentiality controls, perhaps on an industry or project-type basis, that would presume certain information will be kept confidential. These presumptions could operate similarly to

categorical exclusions and could be overcome upon the appropriate showing. The bottom line is that some information should be presumed confidential, instead of requiring a case-by-case showing that security or other factors demand confidential treatment.

Finally, it is important to remember that the public may not have complete access to the Internet. While electronic notices and web pages should be an integral part of dispensing information, hard copy distribution should be maintained.

## 2. Federal and Inter-governmental Collaboration.

For NEPA to serve its purpose, clear agency leadership is generally necessary. This is because the acting agency is responsible for making a decision at the end of the NEPA process and should, therefore, control that process if a truly "decisional" document is to be generated. Accordingly, joint-lead structures should be disfavored. Moreover, participating non-federal agencies and cooperating federal agencies should have more defined roles. For example, early cooperation should be required. If an agency or local government fails to participate in scoping, then its opportunity to raise issues late in the process should be limited. This contributes to the certainty of the process, which is necessary as a practical matter.

Of course, an overly formalized process for inter-governmental collaboration could inordinately slow the NEPA process, which already can be very slow and time consuming. Resources amongst agencies vary significantly, as do agency priorities over time. The formalized procedures in the current CEQ regulations, which offer the opportunity for a lead and cooperating agency in the development of NEPA documentation, are not appropriate for all circumstances. Accordingly, Southern Company recommends that the CEQ consider a more flexible approach which recognizes the realities of the funding levels and the demands upon federal agencies.

## 3. Programmatic Analysis and Tiering.

Southern Company supports the use of programmatic analysis tools and tiering. In the hydropower context, for example, certain routine license amendments for use of project lands do not require detailed NEPA analysis, such as certain water withdrawal uses. Additionally, some operational changes may not require NEPA analysis. For these types of license amendments, tiering and programmatic analysis could provide sufficient NEPA review for the purpose of making licensing decisions nationwide or in specific geographic regions.

In general, Southern Company recommends that programmatic analysis and tiering be conceived in a manner that clearly defines the ability of site-specific NEPA analyses to rely on such "umbrella" statements. While new information should be addressed, it would render programmatic analyses largely superfluous if site-specific NEPA documents had to repeat most or all of the programmatic document. One approach may be to construct a "safe harbor" for relying on such umbrella

documents. In addition CEQ should consider focusing programmatic or tiered documents on the most universal and general aspects of a broad issue. The NRC used an effective approach in the NEPA process for relicensing nuclear generating stations. Overall, we encourage CEQ, and FERC, to consider more strongly using these effective environmental protection approaches.

#### 4. Adaptive Management/Monitoring and Evaluation Plans.

Adaptive Management is a good idea within the context of NEPA as a program, but not within any single NEPA document or series of NEPA reviews. Moreover, there should be no implied substantive component of NEPA which arises under an effort to promote adaptive management. Clearly, no NEPA analysis will ever be conducted with perfect information. However, NEPA itself should not trigger an obligation to revisit decisions once they are made. This would improperly undermine the certainty necessary for modern business. Instead, the CEQ should only embrace adaptive management in the context of the overall NEPA process. For example, the requirement to consider cumulative impacts supports the ideals of adaptive management. However, no single analysis should be reopened without the development of significant new information.

Also, we note that in the context of hydropower, adaptive management must be viewed in the context of section 6 of the FPA which basically requires notice and opportunity for hearing before changes to a license are made. Any CEQ policy or regulation regarding adaptive management would not affect the substantive provisions of the FPA, which require, *inter alia*, public notice and a hearing, license amendment procedures, and other requirements before specific actions which might otherwise be considered "adaptive management" can be taken. Thus, Adaptive Management/Monitoring and Evaluation Plans should focus on measurable benefits, such as those that might be considered with potential changes in hydro project discharge flows. Any change should support justified resource management goals and objectives after scientific evaluation of the potential change. In many cases, the "problem" initially focused upon is the dam when, in fact, other factors may be the root of the problem, such as fishing pressure, or non-point waste water discharge management and surrounding land use. These factors can be beyond the scope of the current action and the implementation of Adaptive Management/Monitoring and Evaluation Plans in the context of NEPA may be misdirected.

#### 5. Categorical Exclusions

Southern Company generally supports the current use of categorical exclusions. However, we recommend agencies standardize and cooperate on universal exclusions. Also, better documentation is important so that unique or unanticipated situations can be fit into existing exclusions.

In addition to the areas specifically raised in CEQ's notice and request for comments, Southern Company would like to comment on three aspects of NEPA that the Task Force should also consider as part of its scope of activities.

1. Environmental Assessments Need to Be Revisited

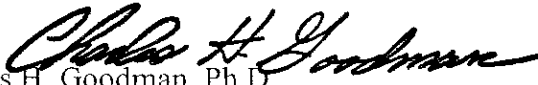
The Environmental Assessment (EA) serves an important conceptual role in the NEPA process. Unfortunately, many factors, including agency practice and court decisions, have allowed the EA to become far too unwieldy and far less useful than originally intended. In many cases, the EA is no longer distinguishable from an EIS. As a conceptual matter, it makes little sense for a determination of whether an impact is "significant" or not to be as involved and intensive as the analysis of impacts which are "significant." It is proper for agencies to document their decision that a given action will not have significant impacts, but this documentation should be limited in scope and detail and should rely on other documents and records freely. Moreover, the CEQ should consider making any regulatory changes necessary to establish that an EA does not require supplementing. If future changes (of whatever source) convert historic federal actions from insignificant to significant, then the proper opportunity for reviewing those impacts is in connection with future actions. Otherwise, the duty to examine cumulative impacts is largely duplicated by the continual supplementation of EA's.

2. Improvements to the Scoping Process

Scoping is rarely done efficiently. As part of the scoping process, the following considerations should be addressed: (i) the elimination of unreasonable alternatives; (ii) the definition of the environmental baseline and (iii) the scope of cumulative and indirect impacts. In all cases, the scoping process should advance the policy of focusing the NEPA process on the most useful information by limiting the analysis of alternatives that are not realistic in the judgment of the lead agency. Scoping should also be used to set an environmental baseline that reflects pre-decisional or existing conditions instead of dismantlement or removal alternatives. Also, pre-scoping efforts, such as pre-meetings, data distributions, and public education presentations, etc. should be used to educate the Public on the scoping process. These policies do not require a formalized approach.

We appreciate the opportunity to submit these comments and look forward to seeing the results of the Task Force's activities. Please call me or Daniel H. Warren at 205-257-6947 if you have any questions about these comments.

Sincerely,

  
Charles H. Goodman, Ph.D.  
Senior Vice President  
Research and Environmental Affairs